Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BROTHERHOOD OF RAILWAY CARMEN,
DIVISION OF TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

This reply brief is respectfully submitted by petitioner Brotherhood of Railway Carmen, Division of Transportation•Communications International Union [hereinafter, "BRC"] in response to the brief by respondent in opposition to this petition.

I. CONTRARY TO RESPONDENT'S ASSERTIONS, THIS CASE INVOLVES THE INTEGRITY OF CONGRESSIONAL RAIL LABOR POLICY

Respondent and the Court of Appeals have viewed the action brought by BRC as one seeking to enjoin implementation of an arbitration award to which the union is a party. Such a view misapprehends the legal basis of this case.

Petitioner BRC brought this action to enjoin a threatened violation of rights secured by the Railway Labor Act to BRC-represented employees on the CSX Transportation, Inc. railroad, formerly known as the Seaboard Coast Line Railroad Company [hereinafter, "CSXT"].

At the time of the filing of the suit, CSXT had invoked the compulsory arbitration procedures of conditions imposed by statutory mandate for the protection of the interests of employees affected by the 1980 Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] order approving CSX Corporation's control of two theretofore independent, competitive railroad systems. The purpose and effect of CSXT's action was to secure *changes* in the rates of pay, rules and working conditions of certain of its employees *by compulsory arbitration* rather than through the procedures of the Railway Labor Act. Petitioner respectfully maintains such changes can be accomplished only in accordance with the procedures designated by Congress in the Railway Labor Act for that purpose. This action was brought to enjoin CSXT from violating BRC's right to have the proposed changes effected only in accordance with that Act and to restrain CSXT from the misuse of the Commission's 1980 order and the employee protective conditions imposed upon CSXT by that order.[1]

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[1] Protective conditions imposed under section 11347, [formerly section 5(2)(f)] of the Interstate Commerce Act have long been recognized as obligations imposed upon the railroad employer to protect the interests of its employees. *See e.g. Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151 at 169 (1967):

> Also, we point out that, under section 5(2)(f), we impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) of the act, the purpose being to *protect* the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. Rights obtained by employees under section 5(2)(f) are the minimum protection which an applicant carrier must provide in order to obtain this Commission's approval of its transaction. (Emphasis by the ICC.)

BRC does not attack the 1980 ICC order in this proceeding. It does not challenge the validity of that order. Petitioner does challenge CSXT's *use* of that order. It is respondent's use of that order that violates the rights of BRC and the employees it represents.

By no stretch of reason can it be argued that this action was commenced to enjoin implementation of an arbitration award as stated by the Court of Appeals (Appendix A at 2a and 8a) and as contended by CSXT. Resp. Br. at i. The complaint was filed before arbitration had even begun and was directed against CSXT's violation of employees' Railway Labor Act and collective bargaining agreement rights by its misuse of the 1980 Commission order upon which it relied. Resp. App. at A-79, *et seq.* Petitioner respectfully submits that the District Court correctly viewed the issue in this case (Appendix B at 17a), although BRC disagrees with the District Court's conclusion that "without an exemption pursuant to 49 U.S.C. § 11341, CSX would be unable to implement the shop transfer" (Appendix B at 21a) and its conclusion that "the proposed shop transfer is necessary to effectuate the CSX merger" (Appendix B at 20a, 21a), for the reasons that implementation of shop transfers have taken place successfully on this and other railroads for many years through the procedures of the Railway Labor Act and the CSX merger had been fully consummated many years before this particular shop transfer dispute arose.

Reduced to its essentials, the conflict here is between those provisions of the Railway Labor Act which impose certain obligations upon CSXT and § 11341(a) of the Interstate Commerce Act which exempts ICC orders from the operation of certain laws in certain circumstances.

As noted throughout the order of the District Court (Appendix B at 11a, *et seq.*), CSXT relies upon 49

U.S.C. § 11341(a) as a complete defense to its actions. Petitioner, on the other hand, relies upon the procedures which Congress laid out in the Railway Labor Act as the exclusive means of changing rates of pay, rules and working conditions of employees in the railroad industry and its clear prohibition against such employees being forced to arbitrate those issues.[2] In its complaint at paragraph 20, BRC clearly set out its claim of statutory violations. Resp. App. at A-86.

This case, as presented to the courts below and this Court, involves the interpretation and application of the authority granted CSXT by ICC orders issued pursuant to Sections 11343(a) and 11344 of the Interstate Commerce Act, 49 U.S.C. §§ 11343(a), 11344, and the exemption contained in Section 11341(a), 49 U.S.C. § 11341 (a), against the conflicting procedures and prohibitions of Sections 2 First, 2 Seventh, 5 First, 6 and 7 First of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Seventh, 155 First, 156 and 157 First, upon actions which CSXT desired to undertake (and has since accomplished).[3]

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[2] Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First provides:

> Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided*, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of *any legal obligation* imposed upon such party by the terms of this Act *or otherwise*. (Emphasis supplied.)

[3] Following the arbitrator's decision which fully favored CSXT, except in prohibiting CSXT from requiring the transfer of the employees protected by the Orange Book protection agreement, CSXT appealed and BRC cross-appealed. Appendix A at 6a. Over a

The controlling legal principle in this case is similar to that which was before this Court in *Seaboard Coast Line v. Daniel*, 333 U.S. 118 (1948). In that case, a railroad which had been authorized by the ICC under the merger provisions of the ICA to acquire and operate lines in South Carolina brought a suit in a South Carolina state court for a declaratory judgment that it could operate such lines without first complying with South Carolina constitutional and statutory provisions requiring such operations to be conducted only by state-created corporations. The state, although questioning the validity of the ICC order as a basis for relief, did not seek to have it set aside or its enforcement enjoined. *Id.* at 122-123. This Court *sua sponte* considered the question of whether the exclusive jurisdiction of federal district courts to annul, enjoin, set aside or suspend orders of the ICC under then 28 U.S.C. § 46 [now restricted to Courts of Appeal under 28 U.S.C. § 2321], deprived the state court of jurisdiction to entertain the railroad's complaint. This Court noted that while the defendant "did question its validity as a basis for relief sought in the complaint", it did not seek to have the ICC order set aside or enjoined. *Id.* at 123. Although this Court recognized that there was indeed, as between the parties, "a bona fide controversy . . . over the validity of the order" (*id.*), this Court held that, notwithstanding the existence of 28 U.S.C. § 46, the railroad properly sought relief in the state court. *Id.* This Court further concluded that the

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year later the Commission issued its decision (Appendix A at 7a), affirming that part of the arbitrator's award favorable to CSXT and reversing that part of the award favorable to the affected employees. Appendix C at 23a, *et seq.* A petition to review that action of the ICC is pending in the United States Court of Appeals for the District of Columbia Circuit in *BRC v. CSXT*, D.C. Cir. No. 88-1794. The issue of rail labor's right to protect itself in a District Court against violations of its Railway Labor Act rights when confronted by a defense based upon 49 U.S.C. § 11341(a) is not present in that case, just as the issue of the validity of an ICC order or an arbitration award issued thereunder is not present here.

state court had authority to determine "whether the order, properly interpreted, did exempt the appellant [railroad] from compliance with the state railroad corporation laws, and, if so, *whether the Commission had transcended its statutory authority in making the order.*" *Id.* (citations omitted; emphasis supplied.)

In the instant case, petitioner seeks to sustain its statutory rights under the RLA and to determine whether CSXT has exceeded the authority granted it by the Commission's order under the Interstate Commerce Act; *i.e.* whether the order, properly interpreted, exempted the railroad from federal railroad labor law as set forth in the Railway Labor Act; and, "if so, whether the Commission has transcended its statutory authority in making the order." *Id.*

In the *Seaboard* case, this Court held that a court of otherwise appropriate jurisdiction was not deprived of that jurisdiction by the congressional restrictions on jurisdiction to review orders of the Interstate Commerce Commission as then set forth in 28 U.S.C. § 46. Applying the *Seaboard* principle to this case, the United States District Court had jurisdiction under 28 U.S.C. § 1337 to determine whether the Railway Labor Act rights of CSXT employees were being violated and, if so, whether 49 U.S.C. § 11341(a) empowered the Commission to exempt CSXT from its statutory and contractual obligations to its employees. *See also, Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co.*, 314 F.2d 424, 428 (8th Cir. 1963).

Petitioner respectfully submits that it has the right to seek in a district court an injunction to prohibit a violation of its and its member-employees' Railway Labor Act and collective bargaining agreement rights by a railroad-employer acting under color of an order of the ICC which it claims supercedes those employees' rights by virtue of the existence of 49 U.S.C. § 11341(a).

The district court in this case faced a classic example of the situation outlined in the concurring opinion of Justice Stevens in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. ——, 96 L.Ed. 2d 222, 247 n.13 (1987):

> Any tribunal faced with a claim that a party is violating some "other law" has the responsibility of determining whether an exemption is "necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control of franchises acquired through the transaction." 49 U.S.C. § 11341. *See Railway Express Agency, supra*, at 215-218.

The district court, we respectfully submit, properly framed the issue before it[4] but failed to give proper weight to the "necessity" component of 49 U.S.C. § 11341(a) when it erroneously held that the authority provided the Commission by § 11341(a) superceded the Railway Labor Act and contract rights of the employees in the circumstances of this case. *Id.*

Regents of the University System of Georgia v. Carroll, et al., 338 U.S. 586, 94 L.Ed. 363 (1950), presented a similar issue. In that case, the Federal Communications Commission [hereinafter, "FCC"] had held that, unless a contract made by a radio licensee with a broadcasting company for the purchase of stock was repudiated, a renewal of the radio license would not be in the public interest. The licensee repudiated the contract as required by the FCC, returned to the FCC and obtained renewal of its license. *Id.* at 590-592. The other party to the contract, the broadcasting company, sued in the state courts for an accounting on the contract and obtained a favorable judgment. The licensee, the Regents, defended on the ground "that to permit recovery would be an interference with the [FC] Commission's power over broadcasting." *Id.* at 593. Among the specific stat-

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[4] *See* Petition for Writ of Certiorari herein at 6-7.

utory authorities relied upon by *Regents* was section 303(r) of the Communications Act of 1934, 47 U.S.C. § 303(r), which empowered the FCC to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."

This Court framed the issue presented by these circumstances as follows:

> May a state now enforce the repudiated contract against the applicant [Regents] although this would have the practical effect of nullifying the repudiation required by the Commission?

Id. at 588. This Court answered in the affirmative. The Court reviewed the statutory authority of the FCC and found lacking therein authority to impose conditions upon an applicant directly affecting the applicant's responsibilities to a third party dealing with the applicant. *Id.* at 600.[5]

The *Regents* case supports the principle that a defense based upon a federal agency's supervening authority does not affect the jurisdiction of a court, otherwise appropriately invoked, to entertain and resolve a dispute even where it involves interpretation of the law governing the federal agency. Petitioner respectfully submits the issue now before this Court for resolution is based upon

[5] At 338 U.S. 600 this Court ruled:

> One suggestion is that petitioner's position has a specific statutory basis in § 303(r), which permits the Commission to prescribe such "conditions" as are "necessary to carry out the provisions" of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. It is in connection with this power that § 303(r) is to be interpreted. The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant.

the same principle, and should be reviewed, for the decision below conflicts with the above decisions of this Court.

II. THERE IS URGENT NEED FOR RESOLUTION OF EMPLOYEES' RIGHT TO REDRESS RAILWAY LABOR ACT VIOLATIONS

Section 11341(a) and its predecessors have been part of the Interstate Commerce Act far longer than has the mandatory employee protection of Section 11347 of that Act which was first included by the 1940 amendments of the ICA. Transportation Act of 1940, Section 7, 54 Stat. 898, 906-07.[6] Until recently, it was not used as a vehicle to supercede the Railway Labor Act and collective bargaining agreement rights of railroad employees.[7]

As pointed out in the Petition for Writ of Certiorari at pages 11 and 12, the Railway Labor Act rights of employees have been declared by railroad management to be superceded by any order of the ICC which approves transactions subject to subchapters 109 and 113 of the ICA.

Each time rail labor seeks to restrain violations of its Railway Labor Act and contract rights, it is met with the carrier's defense that ICC authority supercedes those rights and therefore rail labor's action constitutes a collateral attack upon an ICC order. The courts of appeal are not in agreement on this issue as the citations at page 12 of the Petition for Writ of Certiorari indicate. Indeed, the Court apparently recognized the need to address this issue by its grant of certiorari in No. 87-1888, *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association* and its decision to hold in abeyance the

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[6] Section 11341(a) was first enacted as a part of section 407 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 482.

[7] *See, e.g. Leavens v. Burlington Northern*, 348 I.C.C. 962, 975, 977 (1977); *Southern Ry—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 169 (1967); *Chicago, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 596, 702 (1958).

petition in No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.* Pittsburgh and Lake Erie R.R. and two *amici* have relied upon the collateral attack concept in challenging the Third Circuit's decision in No. 87-1888. The decision by the Court in that case may well resolve this issue. Therefore, it is respectfully suggested that if this Court does not grant certiorari herein that this case be held in abeyance until No. 87-1888 is decided and then reexamine the issue of whether certiorari should be granted.

Again we wish to emphasize that rail labor, rail management and the courts need guidance from this Court as to the proper forum for action brought to redress violations of Railway Labor Act rights when the Interstate Commerce Act is raised as a defense.

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that the writ should be granted or, in the alternative, that this case be held in abeyance pending this Court's disposition of No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*.

Respectfully submitted,

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